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The James McCormick Mitchell Lecture

Language as Violence

v.

Freedom of Expression: Canadian and American Perspectives on Group Defamation

SPEAKERS—ALAN BOROVY, KATHLEEN MAHONEY

COMMENTATORS—BARRY BROWN, JAMIE CAMERON,

DAVID GOLDBERGER, MARI MATSUDA*

Canada's anti-hate laws have recently attracted new attention from the legal community and the public. Canada's Department of Revenue and Customs made headlines when it halted imports of Salman Rushdie's novel The Satanic Verses to determine whether the book violated laws banning the dissemination of hate literature. The brief ban was lifted after the Canadian government ruled the book was not hate propaganda.

The Canadian Supreme Court will soon review two of the anti-hate laws. The Court has granted leave to appeal in Taylor and Western Guard Party v. Canada Human Rights Commission and Regina v. Keegstra. The Taylor case concerns hate messages communicated over the phone in violation of the

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*Canadian Human Rights Act. Keegstra, which was discussed extensively at this November 1988 colloquium, involves a prosecution for promoting hatred against an identifiable group in violation of the Canadian Criminal Code.*¹

—THE EDITORS

VIRGINIA LEARY: On behalf of the Law School, I would like to welcome you to the annual Mitchell Lecture. The Law School is developing a Canadian focus in many areas—in environment, in trade, and in dispute resolution, among others. The colloquium today on free speech and group defamation is another opportunity to learn, and to exchange with our Canadian colleagues. Four of our six speakers are from Canada.

I'm going to turn the program over to Professor Robert Berger, who chairs the university-wide Canadian-American Studies Committee. He will introduce the speakers and will moderate the program this afternoon. Bob?

Robert Berger: Thank you Virginia. This colloquium will demonstrate how much we as Americans can learn from studying Canadian approaches to various issues—legal, as well as social and political and cultural. Even though Canada and Canadians are, in many ways, much like us in the U.S., in many ways—perhaps more than we sometimes realize—they are a different and distinct people and nation. It can really open our eyes to our own peculiarities to look to the Canadian approach as we are doing today.

We've got a wonderfully knowledgeable panel of speakers with quite divergent viewpoints and we will be beginning with our two featured speakers. First will be Alan Borovoy, the long-time general counsel to the Canadian Civil Liberties Association. He's the author of a new book entitled *When Freedoms Collide: The Case for Our Civil Liberties*. Our other featured speaker is Kathleen Mahoney, associate professor of law at the University of Calgary in Alberta. She teaches, among other subjects, human rights, and is coauthor of a new book, *Equality and Judicial Neutrality*. After our two featured speakers, we will have the first of our commentators, Jamie Cameron, associate professor of law at Osgoode Hall Law School of York University in Toronto. She works and teaches in U.S. and Canadian constitutional law. After that, we'll take a short break, just to stretch, because we have a long program. We'll have a few introductory remarks in the second half from Alan Freeman, who is a professor of law here at Buffalo, and then begin with our two speakers

1. *Taylor and Western Guard Party v. Canada Human Rights Comm.*, [1987] 3 F.C. 593, 37 D.L.R.(3d) 577 (Fed. C.A.); *R. v. Keegstra* (1988), 60 Alta. L.R.(2d) 1, 87 A.R. 177, 5 W.W.R. 211 (Alta. C.A.).

from the United States. First will be Mari Matsuda, associate professor of law at the University of Hawaii. She is currently engaged in a major research project on the topic of racial hate messages. We will then move on to David Goldberger, professor of law at Ohio State University College of Law, who, in addition to writing in this area, was the lead counsel in the American Civil Liberties Union case defending the right of the neo-Nazis to demonstrate in Skokie. Finally, the one non-lawyer on our panel is Barry Brown, a syndicated Canadian journalist who follows issues that affect both Canada and the United States and serves, as he describes himself, as foreign correspondent in his own country. I expect this to be quite a lively and illuminating colloquium, and I think we should start right off. So, Alan Borovoy.

Alan Borovoy: It's with a certain amount of reluctance I confess to you that I am the card-carrying general counsel of the Canadian Civil Liberties Association. And a very jealous one at that. Would that one of the candidates for prime minister had attacked our organization the way one of the candidates for president attacked our counterpart; it would have been worth a mint to us.

After all we've been through in this century, the kind of racist invective that still emerges in our two societies has to fill us with a sense of outrage. Particularly after so many have suffered so much, to see people having the gall to say, there was no Holocaust. It is understandable that in all of us, in those of us who are civilized, there would be a very strong impulse to suppress that kind of deeply offensive invective. But the issue is, how do we square that with our commitment to freedom of speech?

Let me begin with the traditional disclaimer: freedom of speech is not and cannot be an absolute. When I say this, I'm not only seeking to disarm my adversaries, but also to force them to come up with more compelling justifications for the various encroachments they seek to impose on freedom of speech. As I acknowledge that freedom of speech is not an absolute, I ask them to acknowledge that it is nevertheless the life blood of the democratic system. It is a freedom that enables us to try to persuade other people to our point of view—to try to marshal the support of others for the redress of our grievances. As a wise old trade unionist once observed, freedom of speech is the grievance procedure of the democratic system.

One of the critical questions that has to arise for those who wish to suppress racist invective is, how are you going to formulate a prohibition so precise that you will nail the racist invective you want to suppress without incurring a terrific risk of catching, in the same net, all kinds of

other speech which you must acknowledge it would be unconscionable for a democratic society to suppress?

Let me tell you about the experience in Canada. I won't go through all of the relevant legislation. I will take the most relevant, the law we passed expressly to deal with these problems, our prohibition against hate propaganda.² It makes it an offense willfully to promote hatred against people distinguished by race, religion, and ethnic origin. Hatred, I suggest to you, is at best a very vague and imprecise word. If it had said something like, it's an offense to incite violence against people on such and such a basis in a situation where there is an imminent peril that the incitement will be acted on, I don't think you would have gotten an argument from our organization. But when you talk about hatred, then we open the floodgates. What does it mean? How far does it go? We know that freedom of speech is sometimes most important, especially to aggrieved minorities, when it hurts, when it offends, when it creates disquiet, when it creates discomfort. The late Martin Luther King, Jr. described his own tactics as an exercise in creative tension. He knew he had to upset people. How does a blunt instrument like the law, and particularly the criminal law, distinguish destructive hatred from constructive tension? I have my doubts that it's possible to do so.

We've had this law for about twenty years. Let me look at the history of the last twenty years. On the streets of Toronto in the mid-1970s you had some young people handing out leaflets at a visiting Shriners Parade. The leaflets bore the words "Yankee Go Home." I hope that isn't too unpopular a message here. And for that, they were arrested by the police on a charge of distributing hate propaganda.³ Now the prosecuting attorney had the good sense subsequently to withdraw the charge. But I always hasten to tell people, particularly lawyers who measure things too often in terms of judicial decisions and not enough in terms of the actual experience of real people, don't derive too much consolation from the fact that the charge didn't proceed. Those activists wound up suffering the suppression of their legitimate protest, and they spent a couple of days in jail.

In the mid-1970s we had a case that went all the way to court, an

2. Canada *Criminal Code*, R.S.C. 1970, c. 11, s. 281.2 (current version at R.S.C. 1985, c. C-42 s. 319.2), provides that communicating public statements that willfully promote hatred against certain identifiable groups is an indictable offense, punishable by up to two years in prison. Another law that has been used makes it a criminal act to willfully publish false news that is likely to harm the public interest. Canada *Criminal Code*, R.S.C. 1985 c. C-42, s. 181.

3. See *Hate Literature Charges Against 3 To Be Dropped*, [Toronto] *Globe and Mail*, July 4, 1975, at 1; *A Law Full of Dangers*, [Toronto] *Globe and Mail*, July 2, 1975, at 6.

absolutely bizarre case in Windsor, Ontario. Some French Canadians were trying to attract money for French education, so they drafted and distributed literature that was anti-French in the hope of creating pro-French sympathy. You have to be a Philadelphia lawyer to figure that out. They were charged and convicted in court of promoting hate propaganda. It took a court of appeal judgment to throw it out.⁴ I'm not suggesting that those people or that absurd prank should have received a medal. But they hardly represent the kind of persons for whom this legislation was designed.

And we've had official investigations conducted. A group of Arab Canadians complained that Léon Uris's book *The Haj* maligned Arab people. That forced an investigation into whether certain libraries should be carrying it. No charge was laid. But why should those librarians, engaged in support of that perfectly legitimate activity, have had to face that kind of investigation? A film in support of Nelson Mandela was held up at the border for more than one month on the grounds it might promote hatred against white South Africans.

If this isn't enough, I invite you to look at how we construe this terminology in other contexts, because words like "hatred," "contempt," and "ridicule" have been in our legal system for quite some time. They exist in our law dealing with criminal libel. At the end of the 1960s, the editors of an underground newspaper were convicted—convicted—for putting out an issue in which they purported to give a certain judge what they called their Pontius Pilate award for justice.⁵ A criminal offense in Canada. And not long after that, a student wrote an article in a campus newspaper which said that a certain trial was a mockery of justice and the courts are instruments of the corporate elite. For that, he was charged with and convicted of our offense of contempt of court by scandalizing the courts.⁶ He went to jail for ten days. Some of this is now being challenged, especially under our new Canadian Charter. But I mentioned this to give you an example of how words like hatred are subject to that kind of interpretation and application.

Now I know, from having debated with Kathleen so many times and with others, that one of the arguments they often make is, we run

4. *R. v. Buzzanga and Durocher* (1979), 101 D.L.R.(3d) 488 (Ont. H. Ct.), 49 C.C.C.(2d) 369 (Ont. C.A.).

5. *R. v. Georgia Straight Publishing Ltd.* (1970), 4 D.L.R.(3d) 383, [1970] 1 C.C.C. 94 (B.C. Co. Ct.); see also Law Reform Commission of Canada, *Defamatory Libel* 17 (Working Paper 35) (Ottawa: Supply and Services, 1984).

6. *R. v. Murphy* (1969), 4 D.L.R.(3d) 289, 1 N.B.R.(2d) 297 (N.B.S.C. App. Div.).

that risk in all our laws; many of them contain a certain amount of imprecision. Of course there's an element of truth in that. I suggest to you, nevertheless, that terms like "hatred" tend to be far more imprecise than many other terms we use in the law. Moreover, the other laws do not involve a value as central to our society as freedom of speech. That's why imprecision here is so much more unacceptable than it might be somewhere else. When I say this, I also have to argue with my lawyer friends who will say, our Charter doesn't accord freedom of speech the same status as the U.S. first amendment does. And I say, please spare me that. My interest does not stop at the confines of the Bill of Rights or the Charter of Rights. I say that in a democratic society, we still make policy judgments and lawyers still have something to say, based on their experience and their expertise, about the wisdom of enacting laws that threaten the grievance procedure of our society.

I also question how much laws like this actually contribute to the interests of racial dignity. In many ways, the requirements of an anti-hate prosecution violate the canons of common sense. From the standpoint of common sense, I would have thought one of the things you don't do is debate the merits of a malevolent obscenity. If I can quote Rabbi Gunther Plaut of Toronto, "If someone calls your mother a whore, you don't debate with him." But when you lay a criminal charge against someone, you are often forced to confront seriously his various defenses. So in the false news prosecution of hate-monger Ernst Zundel in Toronto, you had a solemn debate about the monstrous proposition that Auschwitz was not a Nazi death camp, but a Jewish country club.⁷ And then you have a prosecutor—not the defense, the prosecutor—call as a witness, a non-Jewish banker and ask him if he was in the pay of an international Zionist Communist Banker Jewish Freemason conspiracy. I'm not necessarily criticizing the prosecutor. He felt he had to cover all the elements of the accused's defense. What I'm suggesting, however, is that the risk of farce is endemic to these kinds of proceedings. I hasten to point out, I am not one of those who shrinks from these prosecutions because I'm afraid these Nazis are going to gain such a following with their publicity and notoriety that they'll become a serious force. That is not the reason. I simply shrink from subsidizing the infliction on the public of a gratuitous obscenity.

The question is often asked, why is it worth it? Why do we do it? In

7. *R. v. Zundel* (1987), 58 O.R.(2d) 129, 56 C.R.(3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 61 O.R.(2d) 588n; see *Prosecution in Zundel Trial Faced Long Odds*, [Toronto] *Globe and Mail*, Mar. 1, 1985, at 15.

Canada, the rationale was spelled out by a special government committee that was appointed in the sixties. It was called the Cohen Committee, a very distinguished committee, which made recommendations on the basis of which our anti-hate law was enacted.⁸ And when I say distinguished—the chairman, Maxwell Cohen himself, was a law school dean, and if that isn't enough to convince you he was distinguished, he also became a judge on one of the international courts. The panel also had a future minister of justice, Mark MacGuigan, who subsequently became a judge of the Federal Court of Appeal in Canada. It also had no less a person than Pierre Elliot Trudeau, of whom I'm sure you've heard at least a couple of things in the past. When they were setting out part of the rationale why they wanted this law, they said that, although the number of hate mongers in Canada is small, it's a clear and present danger. And why was it a clear and *present* danger? Because in times of social stress, such hatred *could* mushroom into a real and monstrous threat to our way of life. I would have thought that those two sentences were inconsistent. I would have thought you could not say, that something *is* a clear and present danger, and, at some point *could* be a monstrous threat. I would have thought, at the very least, you could not describe that as a present danger. Subsequently, courts in Canada have split about upholding or striking down the anti-hate law. It hasn't yet been ruled on by the Supreme Court of Canada, but some courts have quoted those sentences with approval. Oliver Wendell Holmes must be turning in his grave.

I am much more persuaded by other indicia. The first director of the Ontario Human Rights Commission tells us, on the basis of all his experience, that Canadians are relatively immune to hate-mongering materials. James Keegstra, the teacher who was prosecuted in Alberta for a violation of the anti-hate law,⁹ ran as a candidate for the Social Credit Party in the last federal election. Of the fifteen constituencies that party contested, it ran last in eleven. In the other four, it just managed to squeak by other aspirants for electoral oblivion, such as the Libertarian Party, the Communist Party, and the official pranksters, the Rhinoceros Party. The Social Credit Party got six-tenths of a percent of the popular vote. Am I to believe that this is a sufficiently clear and present danger to warrant the kind of threats to free speech and racial dignity that this law creates? Invariably, I am met with the reply that Hitler started as a

8. Canada House of Commons, *Report of the Special Committee on Hate Propaganda* (Ottawa: Queen's Printer, 1966) (Chair: M. Cohen) [hereinafter *Cohen Committee Report*].

9. *R. v. Keegstra*, *supra* note 1.

rather undistinguished paper hanger and look what happened. But those who say this overlook the political differences between North America and pre-Hitler Germany, and the legal similarities. Indeed, pre-Hitler Germany had laws very much like our anti-hate law, and it was used quite vigorously. I don't invoke an argument like that as a basis for my case. I invoke it primarily to indicate that, even at best, these laws may not be what some people crack them up to be.

Finally, I believe that we are not so devoid of ingenuity that we cannot find other ways of containing the influences of hate mongers. As for the nobodys, the peripheral creeps, those who have no standing in the community—and that's most of them—we have very effectively contained them by our general posture against the serious racial problems we have: problems of discrimination in jobs, in housing, in public facilities. Our program against racist *deeds* weakens the impact of racist *words*. It creates a climate that makes it harder for the hate mongers to exert any influence. But what about when some of them get a little closer to the mainstream, as happened with Keegstra in Alberta? He was a teacher and the mayor of a small community; that made him important. But before the matter ever became public, he was removed from the classroom. After it became public, he was decertified as a teacher and ousted as a mayor. At that point, he should have been allowed to wallow in the obscurity he so richly deserves.

I believe, therefore, that our anti-hate laws are too dangerous to freedom of speech, create too many problems for racial dignity, and are not needed to contain the influence of the hate mongers themselves. This is not, of course, to discourage the fight against race hatred. It is only to address the means for waging that fight. For these purposes, we should seek, not to impose a legal muzzle, but rather to inflict political censure. Such an approach cannot guarantee that we will find the right balance, but alternative approaches can guarantee that we will find the wrong balance. Thank you very much.

Robert Berger: Thank you Alan. We certainly have the issue presented well by Alan, and we're ready to have our second featured speaker, Kathleen Mahoney.

Kathleen Mahoney: Thank you very much. I too, am very honored to have been invited to speak with you. It's always very difficult to follow such an eloquent speaker as Alan, with his humor, and his very interesting, graphic examples of freedom of speech abuses. It's also almost irresistibly tempting to depart from my script and specifically address the points that he raises. However, I'm not going to do that. My task today is

to try and explain the different constitutional approaches in Canada to freedom of expression issues.

As a starting proposition, Canada and the United States agree that freedom of expression is not an absolute right. Both countries accept that there must be some laws to restrict expression which is seditious, defamatory, obscene, or which incites to violence or breach of the peace. There's agreement that if society is to guarantee freedom of expression, some restrictions may indeed be necessary to insure continued existence of the society and its ability to protect its members. It's on the question of how much authority is necessary that we differ. The Canadian governments and courts draw the line on free speech differently than their American counterparts, where group defamation or hate propaganda is involved.

The reasons for the difference, I will argue, are found in the politics of civil liberties in Canada. In Canada, a stronger emphasis on collective rights is emerging. Increasing recognition of the right of everyone to equal treatment is apparent in legislation and case law, and there is growing acceptance of the view that an egalitarian society may be impossible to achieve when the dissemination of racist ideas is permitted. Therefore, the central thesis of my presentation is the changing nature of rights. I believe liberty and equality are dynamic concepts. They embody values which change with the times.

Although every society's constitution provides a statement of the ideals it aspires to, it is the rights and freedoms actually enforced and protected that reveal the social and political realities of that society. This is especially true where "ideal" goals within the same constitutional instrument come into fundamental conflict with each other, as the goals of equality and liberty often do. Constitutional goals can also clash with other social interests such as the public order, community interests, and stability in the population. How a society applies its constitutional goals to the reality of changing social and economic conditions, tells us a lot about its politics of civil liberties.

In Canada, the politics of civil liberties are gradually changing, evolving toward a more egalitarian society. Historically discriminated-against groups in Canada are not only demanding the opportunities, benefits, and rights which those in the mainstream have always enjoyed, they are beginning to define rights in their own way, based on their life experiences. Freedom of speech as defined by women and minority groups looks different than freedom of speech defined by others. They look at freedom of expression in terms of the liberal ideal and ask, does this make us free? Do we have the same freedom of speech that the dominant

elite have? How would regulation of some forms of speech affect that allocation? They wonder how something experienced by one person can be called freedom, when it is simultaneously experienced by another as violence, oppression, containment, or some other variation of non-freedom.¹⁰ They challenge a concept of freedom which allows hate mongers and pornographers to attack and destroy their constitutional rights with impunity.

These same arguments have been made, perhaps louder and longer, in the United States than in Canada—yet it is in Canada that changes in the concepts of liberty and equality are more visible. This can be explained in terms of our different civil liberties politics, which are determined by a number of factors, including history, the structures of our governments, political processes, social realities, and of course, the content of our constitutional instruments and the judicial interpretation of them.

Canada, unlike the U.S., came into existence without war or revolution. Links with our motherland remain strong, the important consequence being that the British tradition of parliamentary supremacy is a central feature of our government. When Parliament is supreme, it is the government which has the primary responsibility for balancing liberty claims against competing claims. Because of this tradition, Canadians have historically trusted government authority more than Americans have, the dominant view being that the weighing process is better thrashed out in the administrative and legislative processes than in the courts.¹¹ Until 1982, when our Charter of Rights and Freedoms¹² came into effect, civil liberties in Canada were enhanced and protected by the courts only as an incidental outcome of constitutional litigation on division of powers. When overzealous provincial governments tried to legislate in the federal realm in ways harmful to minority interests, their laws more often than not were struck down—not because they violated rights and freedoms—but on jurisdictional grounds of the division of powers between the two levels of government.

In sociological terms, Canada and the United States share some of the same problems of heterogeneity of population, of language differ-

10. Lahey, *The Charter and Pornography: Toward a Restricted Theory of Constitutionally Protected Expression*, in *LITIGATING THE VALUES OF A NATION* 287 (J. Weiler & R. Elliott eds. 1986).

11. Westin, *The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis*, in *THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (W. McKeacher ed. 1983).

12. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), c.11 [hereinafter *Charter*].

ences, and of original native population. In this dimension, definition and reconciliation of minority rights have been central to civil liberties politics in both our countries. But major differences exist in legal and constitutional treatment. One major ideological difference is Canada's rejection of the melting pot approach to cultural diversity adopted in the U.S. in favor of a mosaic approach. One of the objectives of the drafters of the Charter of Rights and Freedoms was to develop a bilingual and multicultural country and a pluralistic mosaic.¹³

Canada's Charter of Rights and Freedoms applies to both provincial and federal governments and guarantees fundamental freedoms, democratic rights, legal rights, equality rights, mobility rights, and language rights. Its commitments are different in many respects from the commitments of the American Bill of Rights. The multicultural section is a case in point.¹⁴ Section 27 of our Charter states that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.¹⁵ This provision is particularly important when courts are required to balance the freedom of expression of hate propagandists against the multiculturalism ideal, especially when read with the powerful equality provision. Section 15(1) of the Charter demonstrates Canada's very strong commitment to equality. It not only guarantees equal protection of the law, like the American Constitution, it also guarantees equality before and under the law and equal benefit of the law without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.¹⁶ It is thus, much broader in scope than the fourteenth amendment, having wider substantive protections as well as more prohibited grounds of discrimination. Section 15(2) of the Charter expressly adds a clause which legitimizes affirmative action in the constitutional definition of equality rights.¹⁷ When Section 15 is read with the multiculturalism section, it

13. Minutes of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (1972) Rec. 3. The minutes state that the purpose of a multicultural provision would be, "To develop Canada as a bilingual and multicultural country in which all its citizens, male and female, young and old, native peoples and métis, and all groups from ethnic origin feel equally at home."

14. *Charter*, s. 27.

15. *Ibid.*

16. *Charter*, s. 15(1), states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

17. *Charter*, s. 15(2) states that s. 15(1) does not preclude laws designed to ameliorate conditions of disadvantaged groups and individuals.

creates a formidable obstacle against those who would use the freedom of expression guarantee to promote hatred against identifiable groups.

Sex equality guarantees are similarly strengthened by Section 28 which states, "Notwithstanding, anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."¹⁸ This section requires a sex equality approach be taken with respect to expression which undermines sex equality guarantees.

In a recent pornography case, the British Columbia Court of Appeals cited Section 28 with Section 15 as its reason for upholding Criminal Code obscenity provisions notwithstanding the freedom of expression guarantees.¹⁹ The court said that if true equality is to be achieved between male and female persons, society must guard against misogynist materials which encourage sexual violence and discrimination against women. This reasoning was very similar to the trial decision in the *Keegstra* case that Alan has already discussed,²⁰ and the Court of Appeal decision in the *Andrews* case,²¹ both of which addressed the incitement to hatred provision. In both cases, the multicultural provision was used to buttress the finding that either the promotion of hatred provisions in the Criminal Code, do not violate the Charter's guarantee of freedom of expression or hate propaganda laws are reasonable limits, demonstrably justified in a free and democratic society.²²

The other minority interests protected in the Charter—including language and education rights, aboriginal rights, and rights for denominational separate or dissentient schools—underline the strong commitment to collective rights in the Charter which is not evident in the American Constitution.

A further difference between our two constitutions is the express standard in the Charter for judging limits on rights. Section 1 states that the rights and freedoms in the Charter are guaranteed, but may be subject to reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.²³ Because of Section 1, a very careful balancing of interests is required when rights conflict. No hierar-

18. *Charter*, s. 28.

19. *R. v. Red Hot Video Ltd.* (1985), 18 C.C.C.(3d) 1, 45 C.R.(3d) 36 (B.C.C.A.).

20. *R. v. Keegstra*, *supra* note 1.

21. *R. v. Andrews and Smith* (1988), 65 O.R.(2d) 161, 28 O.A.C. 161 (Ont. C.A.).

22. *Charter*, s. 1. At trial, Justice Quigley used both reasons in the *Keegstra* decision. The majority of the Ontario Court of Appeals found that freedom of expression does not give constitutional protection to hate mongering. The minority concluded that freedom of expression was limited by the hate propaganda law, but it is a reasonable limit within s.1 of the *Charter*.

23. *Ibid.*

chy of rights is created in our constitution, contrary to what Alan would have you believe. To determine if a limit on a right or freedom is reasonable and demonstrably justified, two major factors are examined. First, the purpose of the limit must be an important one. Second, the means chosen to carry out that purpose must be rationally connected to it and limit the rights or freedom as little as possible. There must be proportionality between the effects of the limit and the desired result.

Now that all sounds rather complicated, so I'm going to use an example to show you how the different values come into play in the Section 1 balancing process. Let's take the most controversial of the hate propaganda laws—the Criminal Code section that prohibits the willful promotion of hatred against an identifiable group,²⁴ not requiring a breach of the peace.

In the Section 1 constitutional balancing process, the Crown must show that the crime of promoting hatred against identifiable groups can pass the purpose test. Since the hate law was designed to protect constitutionally entrenched equality rights of minority groups, as well as the multicultural nature of Canadian society, it *prima facie* has an important purpose. The Ontario Court of Appeal affirmed the importance of hate laws when it said that multiculturalism cannot be preserved, let alone enhanced, if free reign is given to the promotion of hatred against identifiable cultural groups. The Court said it would be strange and perverse contradiction if the Charter were used to strike down a law aimed at preserving our multicultural heritage by limiting in a minimal and reasonable way, freedom of expression.²⁵

In addition to this purpose within Canada, external obligations provide another important purpose for the limits. The international community has long recognized the evil inherent in the promotion of hatred against identifiable groups. As a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination,²⁶ Canada is required to prohibit, as a matter of law, the dissemination of hate propaganda. If Canada were to decide free speech is more important than the

24. Canada *Criminal Code*, R.S.C. 1970, c. 11, s. 281.2 (current version at R.S.C. 1985, c.c-42, s. 319.2).

25. *R. v. Andrews and Smith*, *supra* note 21. The Report of the Special Committee on Hate Propaganda underlines this. After a careful study, the Committee reported to Parliament that the Canadian community has a duty—not merely a right—to protect itself from the corrosive effects of propaganda which tends to undermine the confidence that various groups in a multicultural society must have in each other. See *Cohen Committee Report*, *supra* note 8.

26. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

intentional incitement of racial, ethnic, and religious hatred, it would breach its international obligations and undermine its international stature and reputation.

It can be further argued that the purpose test is satisfied because in addition to protecting societal interests from harm, law against hate propaganda serves the important purpose of preventing harm to the target group. The Law Reform Commission of Canada in its 1986 paper *Hate Propaganda*, cited the inhumane practices of totalitarian regimes, particularly the Third Reich, as reason to set general speech standards for the respect of persons and minorities.²⁷ The Commission said it is important to remember how repetition of hate propaganda by the Nazis led in rapid succession to the breaking of shop windows of Jewish merchants, to the seizure of their property, to the expulsion of Jews from their professions, to the establishment of concentration camps, and finally, to the gas chambers. In view of Hitler's successful use of hate propaganda to drive reason from the field, the Commission took the view that absolute faith in a rational, free marketplace of ideas was not only wrong-headed, but irresponsible. Evidence of real harm caused to Jews and others by the racist regime of the Third Reich demonstrates how target groups can be hurt physically and emotionally by hate propaganda.

The second branch of the balancing process is the means chosen test. It requires an examination of the way freedom of expression is curtailed, to see whether there is some balance between the limitation of the speech and the reason for limiting it. The means chosen here, the hate propaganda laws which prohibit the willful promotion of hatred against identifiable groups, is a criminal law. It is obviously rationally connected to the objective of protecting groups from racial hatred, but is the law too broad? The elements of the offense of the willful promotion of hatred are that the accused must communicate the statement publicly, and there must be an intention on the part of the accused to incite hatred.²⁸ It is clear that the law is not intended to prohibit anything but extreme forms of speech. Mere contentious, irritating, and annoying speech would not meet the criteria of that section. The scope then of the hate law is limited to public communication which must be made with the intention of promoting hatred.

A further step in examining the means chosen, is to look at what defenses are available to an accused. For the crime of inciting hatred

27. Law Reform Commission of Canada, *Hate Propaganda* (Ottawa: 1986) (working paper 50).

28. Canada *Criminal Code*, R.S.C. 1970, c. 11, s. 281.2 (current version at R.S.C. 1985, c.c-42, s. 319.2).

against an identifiable group, an accused cannot be convicted if he establishes any one of the following defenses: that the statements he communicated were true; if what he expressed was intended to establish an opinion on a religious subject; if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit and, if on reasonable grounds he believed them to be true; and if in good faith he intended to point out for the purpose of removing them, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.²⁹

The defenses taken with the intent requirements show that the hate propaganda law is narrow in scope. Perhaps it could be made narrower. However, I'm arguing more for its existence rather than its perfection. Whether the law is narrow enough will soon be decided by the Supreme Court of Canada. Two provincial courts of appeal presently disagree on this point. In the *Keegstra* case, the Alberta Court of Appeal found the law overly broad, whereas the Ontario Court of Appeal in the *Andrews* case did not. The court in the *Keegstra* case³⁰ took what I would call an American approach. It looked for clear and present danger or actual harm to justify the law. Some sort of crisis would be required before the proportionality test could be satisfied. The court failed to give any weight to competing constitutional rights. Instead, it trivialized them, stating Section 15 and Section 27 of the Charter do not forbid Canadians from disagreeing with the ideas they contained. The court added that real harm to the target group such as social ostracization, alienation, and wide-spread acceptance of the message, would be required to make a hate law constitutional. A threat of harm would not be sufficient. The court in *Andrews*,³¹ on the other hand, upheld the hate propaganda law. It pointed to other Criminal Code offenses, such as attempted murder and driving with a blood-alcohol content of over 80 mg., which exist to prevent threatened or potential harm. Justice Cory (as he then was) pointed out that the very basis for the existence of the offense of driving over 80 mg. is founded on empirical data as to the danger that people driving a motor vehicle with such a blood alcohol count constitute to members of the public. He felt the empirical data from the history of the Third Reich and the studies of the Cohen Committee are entitled to the same weight. Not only does that data establish the risk of harm to identifiable groups by the promotion of hatred, but the actual harm caused. He concluded

29. *Ibid.* s. 281.2(3) (current version at s. 319.2(3)).

30. *R. v. Keegstra*, *supra* note 1.

31. *R. v. Andrews and Smith*, *supra* note 21.

that immediate harm was not required to uphold the anti-hate law. The *Andrews* court also found the law narrow in scope, particularly because of the defenses open to the accused.

In my opinion, the *Andrews* approach is the better one. It referred to competing rights and national multicultural goals in conjunction with freedom of expression, and recognized that expression which instills enmity and detestation does "incalculable damage to the Canadian community and lays the foundations for the mistreatment of members of the victimized groups." In its recognition of competing equality rights, the *Andrews* court gives substance and meaning to our legal egalitarian values similar to the Supreme Court's approach in the *Morgentaler* case,³² the Canadian equivalent of *Roe v. Wade*.³³ Madame Justice Wilson recognized the struggle women have had in defining their own rights. She said that the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms to place women in the same position as men. She continues that women's needs and aspirations are only now being translated into protective rights.³⁴

This same approach must be considered in minority rights cases where hate propaganda is an issue. With the Charter, a new dimension or yardstick of reconciliation was created between the individual and the community, and their respective rights. It would be unfortunate if the Charter were used as a shield for racists, protecting the dissemination of hate propaganda rather than protecting against it. If hate propaganda is permitted under the flagship of freedom of expression, racial incitement and the practice of race discrimination turns into a legal entitlement.

Until recently, only the dominant elite championed the rights of free speech. Now women and minority groups in Canada have served notice that they will fight for their own concepts of equal rights and freedoms. The ultimate answer is, time will tell. Every society gets the kind of civil liberties politics that its social realities and political systems deserve and dictate. The Canadian ethic is one of egalitarianism, and it is one we deserve and I hope our system can deliver it. We have the tools to do it. We have a Charter unique in free societies of the world. It requires bal-

32. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C.(3d) 449.

33. *Roe v. Wade*, 410 U.S. 113 (1973).

34. *R. v. Morgentaler*, *supra* note 32, at 36.

ance. It provides a careful mechanism. I think we can do it, and I certainly think we should try.

Robert Berger: Thank you Kathleen. We have the issues well presented at this point, and Jamie Cameron will now speak.

Jamie Cameron: Thank you. I'd like to begin with four propositions. I hope you'll forgive me if they seem trite, but they are truisms of American constitutional culture, and therefore provide the foundation for what I will refer to as First Amendment Romanticism.

Proposition Number One is this: there can be no liberty without a constitution. When I use the word constitution, of course, I'm necessarily including its institutional props, the Bill of Rights and judicial review. The following statement was made in 1799: "American students should be taught to love and admire our present excellent constitution and to believe that with its destruction, will perish the remains of *all liberty in the world*."³⁵ I believe that Americans accept that view as much today as they might have back then. This leads to Proposition Number Two: liberty under the Constitution cannot exist without freedom of speech. Thus, we have the famous words of Justice Holmes in dissent in *United States v. Schwimmer*, "[I]f there is any principle of the constitution that more imperatively calls for attachment than any other it is the principle of free thought . . ."³⁶ These words were developed a few years later by Justice Cardozo in *Palko v. Connecticut*, where he referred to freedom of thought as the matrix and indispensable condition of nearly every other form of freedom.³⁷ To summarize to this point, Dogma Number One asserts that liberty requires a constitution. And Dogma Number Two asserts that constitutional liberty requires freedom of expressions.

Propositions Three and Four are required by Propositions One and Two. Proposition Three is this: because liberty requires a constitution, and because constitutional liberty requires freedom of expression, the first amendment must be given a purist and almost absolute interpretation. Hence, part two of Holmes's reasoning in *Schwimmer*, where he said that if the first amendment means anything, it means that we must respect the thought we hate as much, if not more, than the thought we

35. Letter from B. Rush to J. Montgomery (June 21, 1799), reprinted in 2 THE LETTERS OF BENJAMIN RUSH 812 (1951), noted in M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 77 (1986).

36. *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting) (defending right of pacifist to become naturalized citizen).

37. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.) (holding Connecticut statute which permitted criminal appeals to be taken by the state is not a violation of the double jeopardy clause embodied in the fifth amendment).

love.³⁸ Not only do Americans tolerate speech they hate, they tolerate speech they hate on the subjects that are of the greatest importance to them. As Justice Jackson put it in another famous case, the freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom, he said. The test of its substance is the right to differ on things that touch the heart of the existing order.³⁹ That, Americans have been told time and time again, is the theory of the constitution. Proposition Number Four simply reveals the results of all the foregoing: the Constitution makes Liberty safest in America, Americans the freest of all people, and most important, the most tolerant of all people.

Those are my four propositions. They lead to what I have already referred to as First Amendment Romanticism. I'll only identify three elements of First Amendment Romanticism. There are probably others. First is the idea that protecting freedom of expression is an act of courage. As Justice Brandeis tells us in *Whitney v. California*,⁴⁰ those who won your independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. They were courageous, self-reliant men who understood that it is the function of speech to free men from the bondage of irrational fears.

Second, protecting freedom of expression is also a testament to democracy in America. Americans will often tell you that, unlike other countries which are not mature enough, which are less stable, less committed to democracy—unlike those other countries, America does not find it necessary to suppress freedom of expression. Why? Because, as Justice Jackson put it,

[A]ssurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it, makes for its better support. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind⁴¹

This brings me to the third element of First Amendment Romanticism, which is the idea that protecting freedom of speech shows the triumph of reason over belief. Freedom of expression requires a commitment to the *power of reason*.⁴² This is an expression used by Justice Brandeis, once again in *Whitney v. California*. To believe otherwise,

38. *Schwimmer*, 279 U.S. at 655.

39. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (invalidating mandatory flag salute).

40. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

41. *Barnette*, 319 U.S. at 636, 637.

42. See *Whitney*, 274 U.S. at 377.

Americans tell themselves, is to make an unflattering estimate of the appeal of their institutions to free minds. Thus the price of free speech is a small one, the price of occasional eccentricity and abnormal attitudes, and the remedy is an easy one. The remedy is more speech, not less.⁴³

Americans have convinced themselves that when the United States Constitution protects freedom of expression, it does so as an act of courage, it does so because of the strength of American constitutional democracy, and it does so because of faith in the power of reason. But if this is what it's all about, why did the Supreme Court of Illinois claim in the *Skokie cases*⁴⁴ that U.S. Supreme Court decisions "compel us to permit the demonstrations,"⁴⁵ and that "[w]e reluctantly conclude that the display of the swastika cannot be enjoined."⁴⁶ You would find similar language in the federal circuit court opinion.⁴⁷ This might not strike everybody as an act of judicial courage. It could hardly be said that the expression in question reinforced democratic institutions by making Skokie citizens feel safer in their country of choice. It makes no apparent appeal to the power of reason and seems rather to appeal to the power of intimidation.

This leads me to conclude that, when the rhetorical facade is stripped away, there's really only one explanation for the extremism of first amendment doctrine: Americans believe that it is the necessary interpretation of the first amendment. Americans claim that it is an either/or situation: a choice between insidious censorship or freedom of thought. And they chose freedom of thought. To illustrate, I'll just give one example. Forgive my penchant for quotations; I use them because I like to think that the best way to unsettle Americans is to quote them to themselves. This time it is Justice Black quoting Thomas Jefferson:

"I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. These ordures are rapidly depraving the public taste.

"It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being

43. *Id.* at 641.

44. The *Skokie Cases* litigated the American Nazi Party's constitutional right to demonstrate in an Illinois suburb inhabited primarily by Jewish persons, many of whom were Holocaust survivors or relatives of Holocaust victims. At the end of the litigation, the neo-Nazis' first amendment right was vindicated, despite the severe psychic harm residents of Skokie would have suffered. The complicated history of the *Skokie Cases* is summarized in *Village of Skokie v. National Socialist Party*, 69 Ill.2d 605, 373 N.E.2d 21 (1978).

45. *Id.* at 612, 373 N.E.2d at 23.

46. *Id.* at 619, 373 N.E.2d at 26.

47. *Collin v. Smith*, 578 F.2d 1197, 1200 (7th Cir. 1978).

lost."⁴⁸

Cannot is the word he used. Why not?

Americans still embrace an eighteenth century conception of human nature and the state. In this world, society is perceived as hostile and humankind as self-interested and aggressive. Individuals seek to assert dominion over other individuals, and the state seeks to assert dominion over everybody. At the micro level, individuals fear and distrust each other, and at the macro level, they fear and distrust the state. This is both a distinctive and pervasive element in American constitutional culture, and indeed it may be most deeply entrenched at this point in time in the jurisprudence of the first amendment. This results in a requirement of extreme egalitarianism between different types of speech because everything else, according to Americans, is censorship. So when Americans talk about protecting speech as an act of courage born of strength, belief in democratic institutions and the power of reason, I don't quite believe them. These principles seem as much about fear as courage, and more about moral agnosticism than about participatory democracy or the triumph of reason.

I want to conclude with two quotations which speak very perceptively to this whole aspect of first amendment jurisprudence. The first is by Max Lerner, and this is the observation he made a long time ago about the nature of American constitutional culture. He said, "We are, in a sense, a barbaric people, only several generations removed from the wilderness psychology. The whole development of American life has been riddled with violence. . . . We live in a jungle of fear of such violence, and our exaggerated lip service to 'law and order' and our cult of judges are functions of that fear."⁴⁹ He went on to say, "The ultimate power of the Supreme Court and the Constitution. . . comes from what is, in the last analysis, the strongest support any institution or tradition can have—namely, fear . . . I mean the fear of not having the Court and the Constitution to fall back upon . . . For it is fear and not will which underlies a good part of our politics—the creeping fear of people who do not want to make decisions, and prefer to surrender their decisions to others."⁵⁰ Hence, the futile plea of a Frankfurter who complained of America's constant preoccupation with the constitutionality of legislation rather than with its wisdom,⁵¹ and consequently, the preoccupation

48. *Bridges v. California*, 314 U.S. 250, 270 n.16 (1941).

49. Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1311 (1937) (note omitted).

50. *Id.* at 1316.

51. *Barnette*, 319 U.S. at 670 (dissenting).

of the American mind with a false value. The end of the American phase of this comment is that the first amendment is not all about sweetness and light. Paradoxically, it's just as much about fear and loathing.⁵²

Now let me pick on Canada for a minute. Fortunately I can do that much more briefly. Unlike Americans, we do not live in obsessive fear of the *state*. Instead, we live in obsessive fear of the *United States*. We don't lack confidence in the viability of parliamentary institutions. We lack confidence in our viability as a nation. We continue to manifest a deep-seated, profoundly felt and often irrational fear of the Americans. Curiously, however, the Charter of Rights and Freedoms may well end up being a greater threat to our cultural integrity than the free trade agreement. But, largely because of the romanticism surrounding a self-important role for the individual, the Charter is not portrayed as such.

Having said that, after years of training in the classroom, I have mastered the technique of being able to confuse my audience and come up with what I think might be a fairly unpredictable conclusion. Despite what I said about American constitutional culture and the first amendment, I believe that our hate literature provisions in Canada may be unconstitutional. Prohibiting hate literature requires two things: first of all, that collective values prevail over individualist values; and second, perhaps more important in the context of the first amendment, that belief wins out over reason. It's my view that hate literature can only be banned as a matter of belief—subjective belief, subjective perception—that it is wrong.

Prior to the Charter, the political community in Canada decided, as a matter of belief, as a matter of judgment, as a matter of political responsibility, that hate literature is wrong, bad, and intolerable. However, when we acquired fundamental rights, what had previously been a matter of belief and collective values all at once became an abstraction, a legal principle, a question of reason. The American orthodoxy that there are no lines between censorship and freedom is not without foundation in a legal or constitutional regime. The problem is not that the lines can't be drawn, the problem is the lines cannot be defended. I have reluctantly concluded that this is an unavoidable result. Freedom of speech is protected as an instrument of reason. I don't especially believe that is the reality, but I very definitely believe that is the constitutional rationale, the underlying rationale that supports freedom of expression as a legal

52. Timing and forum constraints have forced me to be provocative at the expense of being persuasive. The ideas in this presentation are being developed in an Article provisionally titled *Realism, Formalism, and First Amendment Romanticism*.

concept. Abstract reason cannot distinguish between different types of expression. Why not? Because whether speech is right or wrong, good or bad, is a matter of perception, belief, persuasion, not logic. If the purpose of a constitution is to protect ideas from popular belief, the state cannot declare certain types of speech unconstitutional because they are unreasonable. It is prohibited from doing what was a matter of course prior to the Charter because the nature of the question has changed; it has become a question of principle, of abstraction, of legal reasoning.

That change in the texture of the issue precludes the conclusion that freedom of expression can be prohibited simply because it is unreasonable or wrong. As Justice Rehnquist said in *Arnett v. Kennedy*,⁵³ at a certain point in time, people must realize that sometimes they have to take the bitter with the sweet. I have very mixed views about the Charter. In the case of the Charter and hate literature, I would turn Justice Rehnquist's expression around and say that here, it may be a question of taking the bitter with the bitter. Thank you very much.

Robert Berger: We have much more to come in both the U.S. and Canadian contexts. Indeed, we might even get the answer to the question, why would anybody mention Geraldo Rivera's name in this context? But why don't we take a ten minute stretch and then we'll pick up again.

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Alan Freeman: OK, I've got to kick off round two. Taking the path of extreme and perhaps tongue-in-cheek understatement, I would suggest that just about everybody in this room would agree that Canada is no less civilized than the United States. Given that, we have just heard what is an on-going lively debate in Canada over the punishability of hate messages. To be sure there is a debate, and there are two credible positions at issue. In the United States, a similar debate would have been regarded as unthinkable until very recently. The idea that we could punish such material would have been met immediately by, "The first amendment would not allow that," end of discussion, gone. Over the last couple of years, though, an American version of the debate has suddenly developed. We are taking these issues seriously, and the next two speakers will be kind of a moment in a new and on-going American counterpart of the Canadian debate.

That the debate is happening these days in this country is not merely academic. What is happening is an increasing, rising, cumulative outbreak of virulent racism. That's the reality out there. Just this past Mon-

53. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

day in the *New York Times*, October 31, there was yet another report of racism on the campuses. Campuses are where we think tolerance and diversity would be promoted, not the scene of increasing epithets, slogans, scrawled symbols— directed at Black people, at feminists, at Jews. It's happening more and more, and the question is, can we do something about it? Let's hear from the speakers.

Robert Berger: With that, we'll begin with Mari Matsuda.

Mari Matsuda: Thank you. I'd like to thank all of you at Buffalo, and especially the students, for attending today. This is such an important topic, and I'm excited to see intellectual and political debate on this issue. It's also a privilege to appear with our neighbors from Canada. For a long time, Canada has served as the conscience of North America, from the days of slavery through Vietnam to the present. We've always looked north for guidance on issues that we in this country have been less able to rise to. So it's an honor to appear with Canadians and to hear the lively debate that's coming from that country.

I start with the premise that I am a lawyer. I am a member of the American Civil Liberties Union. I took an oath to uphold and defend the Constitution. I believe in the Bill of Rights. I also believe that there should be legal limitations on misogynist and racist hate speech in this country.⁵⁴ That may strike some people as a paradox. The last time I spoke on this issue, someone came up to me afterwards and said, "I never thought I would see the day when a lawyer would say the things that you're saying." But my position is that you can be a lawyer, you can be committed to the concept of rights, and particularly to the values of the first amendment, and still recognize the need to limit racist hate speech. I come to that position in part as a woman and as a person of color, influenced by the new jurisprudence that's coming from our communities—the feminist jurisprudence, critical jurisprudence, and jurisprudence of people of color that recognizes that there are different ways to look at law and legal theory. Some of this jurisprudence, for instance, recognizes the need to look at history, to look at individual experience, to look at context in analyzing the effects of the laws that we promulgate. We should recognize the effects of those laws on groups of people and on communities of people, not just on individuals. We need to reevaluate the concept of rights and the concept of equality to recognize the needs of oppressed communities in our country. How may we do that?

54. A formal exposition of this position is forthcoming in *Public Sanction of Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. (Aug.).

I use the principal of equality as a starting point. And I respectfully disagree with my colleague from the Canadian Civil Liberties Association. I think the first amendment and the concept of free speech is an important one, but if I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality. I mean substantive as well as procedural equality. I don't know much about your community, but I would guess that you have homeless people, that you have poor people, that you have people of color, to whom the right of freedom of speech is relatively meaningless. Until we are able to bring our brothers and sisters to some level of equality where they can participate equally in the political process, rights like free speech are going to remain relatively meaningless to them.

The values at the heart of the first amendment are the values of personhood—that each human being is special and deserves a place in this society in their beliefs and their personal consciousness. From that value I derive my position that we need to limit hate speech.

I had the experience of arriving in Perth, Australia to find the entire city plastered with large posters that said, in very graphic, bold lettering: "Asians Out or Racial War." It was interesting to me to see my own response. The first response was, of course, a real fear response, the body preparing for a fight. But then some very strange things happened in my mind. I started thinking, they don't mean me, they mean those other Asians, those immigrants, the Hong Kong people. Of course, that's not true. Racists do not make subtle distinctions between native-born Americans and immigrant Asians. Or Japanese or Chinese. Racism is racism. And they *do* mean me.

The other thing I found going on in my own psychology was that all my interactions with white people from then on were colored by the fact that this hate speech existed in the town. I found myself being super polite, using an educated inflection so that people wouldn't confuse me with those "other" Asians. If people were rude to me, I had to stop and think, now is this plain old ordinary rudeness or is this racism? A whole layer of junk colored all my normal interactions with other human beings. I think that the same process in a different way goes on for dominant group members. For instance, white people may feel the need to be extra polite, so that people know that *they're* not the people who are putting up those signs. Or white people may feel a moment of relief that they are not the target, even as they reject the speech. I know, for instance, that when I get anti-Semitic literature, two things go on: one,

anger, and two, a moment when I think, it's not me, thank God. Then I have to reject that and say no. An attack on any people because of their ethnicity, their religion, their race, is an attack on me. But there is that secret guilty moment of gratitude that one is not the victim. This is another insidious way in which this kind of speech destroys normal relations and normal social interaction between groups.

The other thing that goes on, is that when this forbidden, hateful, evil, ugly idea is planted in our minds, we're forced to constantly reject it. You can't not think about it, so that when you interact with a person that is a member of the target group, the idea comes into the mind and then it must be rejected. That is a real social harm with real social effects. Those are some of the subtler costs. The more obvious costs are reported in the literature. In the San Francisco fire department, people come to work and there's a swastika on their desks. In Florida, a black woman comes to work and is constantly harassed with KKK literature from her colleagues. A noose hangs over her desk one morning. People pay a real price for this. The woman who found the noose hanging over her desk eventually had a nervous breakdown and had to seek psychiatric treatment.

So I start from the premise that there is a harm, and the choice to completely ignore that harm and to refuse to recognize it as a countervailing principle when we do the first amendment analysis reinforces racism. How then can we develop a new first amendment jurisprudence that acknowledges the harm and yet remains true to the principles of the first amendment and free speech? I'd like to commend my colleagues who appear today taking a strong first amendment position, because I know that position is not taken without cost. And I will use a little First Amendment Romanticism and say that I do commend the lawyers who are fighting for free speech in this country, in this particular context, because there is a heavy price to pay for that. I think it is an act of courage, as much as I disagree with the position. I do think that we need to take a strong stand for free speech and against censorship. How can we do that and at the same time limit hate speech?

My suggestion is that we should define very narrowly the kind of speech that we intend to limit and that we should define it on the basis of content. That is, I think, heresy in first amendment doctrine. But in the long run we remain truer to the protection of political speech if we look candidly at the content of this hate speech that we intend to limit. I would propose three markers for identifying the kind of speech that should be limited. The first is speech that advocates the inherent superi-

ority of one group of human beings over another. The second is speech directed at an historically oppressed group. Third is speech that uses the language of hatred, degradation, and persecution. It's very close to the Canadian position. The only addition I would make is that we want to get away from neutral application of this law and really say that what we're after is the most dangerous kind of speech, speech that's directed against historical victim groups. We need to use our historical knowledge.

We cannot deny the reality of racism as a historical factor in this country and on this planet. We cannot deny the intersection of racism and violence, particularly in this country. And we can't deny the fact that we fought wars and resolved some of these issues. Two the bloodiest wars of this country's history, the Civil War and World War II, had at the core a decision to reject the idea of racial supremacy. Historical memory is important. I think we've taken a pledge to remember the Holocaust. And we've taken a vow that it will never happen again. We can say that we have made collective human progress on this promise. We can reject the idea of racial supremacy, deny that it is an idea that belongs in the marketplace of ideas. I know that my brothers and sisters from the civil liberties community are having chills when I say that. But I do think that this pledge, contextualized to tie our legal analysis into history, will save us from going down the path of unbridled government power and unbridled censorship. Hate speech directed against Jews and Blacks in particular—we've gone through this issue. We don't need to keep re-resolving it. We need to look at the emerging international standards, the human rights covenants, that have rejected the idea of racist speech.⁵⁵ We need to look at development in the Anglo-American legal tradition that leaves the United States alone in the refusal to have any response to racial hate speech, and we need to say, this type of speech is uniquely harmful. We have progressed enough as a human race that we can reject this kind of speech out of hand.

It's useful to compare Marxist-Leninist speech, which is the other type of speech that is so stigmatized and vulnerable to censorship, to understand why the two are different. Marxist-Leninist speech, I would

55. See, e.g., *International Covenant on Civil and Political Rights*, adopted by *United Nations General Assembly* December 16, 1966, art. 20, 999 U.N.T.S. 171, 178 (entered into force March 23, 1976) (stating that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."); *International Convention on the Elimination of All Forms of Racial Discrimination*, 4 opened for signature March 7, 1966, art. 4, 660 U.N.T.S. 195, 218-19 (entered into force Jan. 4, 1969) (stating that "[s]tate Parties . . . [s]hall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred . . .").

posit, is political speech. It goes to the means for distributing wealth and power in the community, to the form of political process, and to the form of government we want. There is no consensus on this planet either accepting or rejecting that type of speech. We are still in the collective process of deciding what we think about that idea. In contrast, there is no country left on this planet that asserts racial superiority as its national position. Even South Africa is not using white supremacy as a justification for apartheid. Instead, it's using other types of arguments, one step at a time, the need for a peaceful transition of government, the need to protect the rights of minorities.

We don't need to fight another war or see another Holocaust to convince us of this truth. By narrowly setting aside racist hate speech as one type of speech to which we will allow a limited legal response, we can recognize first amendment values and still recognize other important constitutional values: freedom of access, equality, personhood, freedom to travel, freedom to enjoy all the benefits—including the economic benefits—of life in this society. The principal of equality and substantive due process is recognized when we start making the very difficult—it's not going to be easy—the very difficult balance. I would suggest, in addition, an interpretive rule that says, when there is doubt, side with free speech and against censorship.

If any of you have seen this stuff, it is ugly, and I don't think we have any problem putting in a corner this most egregious kind of racist speech. To give you another example from my own experience, the last time I spoke publicly on this issue, I received hate mail. That represents a form of censorship. I'd like to publish some of these ideas in the popular press, because I think they're ideas that should be debated in public. But I've made a tentative decision not to, because I would receive threats against my person. And at this point, I'm not willing to take that risk. That's another way in which first amendment values are implicated. I feel censored in expressing these views because of the network of racial terrorism that's going on in this country. And it is a network. These are not isolated incidents. The kinds of anti-Semitic statements that I'm seeing in my community in Hawaii, where there is no sizeable Jewish population, can only be the result of a national network. So again, I think first amendment values are implicated.

My time is almost up, but I just wanted to mention a few hard cases that I think helped me develop my thinking in this area. The first hard case is the case of the angry nationalist. What do you do about hate speech that comes from an experience of oppression? Some Black nation-

alists' speech might be an example. One that I'm familiar with from my community is a Native Hawaiian woman who, in response to the fact of genocide against Native Hawaiians, wrote a poem expressing her hatred and anger at white women for what has happened.⁵⁶ If there is any legal limitation of racist hate speech, it should not apply to hate speech that comes from an experience of oppression. Again, to develop an interpretation around that area, you would need a consciousness of history.

The second hard case is the social pseudoscientist who posits some kind of racial inferiority theory, but does it in a scientific way—empirical evidence, IQs, and no language of persecution, degradation, or hatred. I find that kind of speech offensive, but I wouldn't criminalize it or create an action for damages against it, because of the absence of the language of hatred and persecution. It moves away from the worst case type of speech we need to limit.

We can start to develop a jurisprudence, and lawyers know how to do this. To create exceptions, narrow interpretations, means of using the law to limit hate speech without opening the floodgates of censorship. We've done it in other areas, we've done it with commercial speech, defamation, and other kinds of speech. Let's think about attacking racism through the law by creating a legal response to this worst-case type of hate speech. It's not easy and I commend those of you at this university who are struggling with these ideas. My presentation is a tentative one and I would welcome critical response from the audience and from the other commentators. I think we need to work through these ideas as a group. Thank you.

Robert Berger: Thank you Mari. And now, we'll hear from David Goldberger.

David Goldberger: The starting point for my comments is the fairly simple proposition that all political speech should be protected. That would include political speech that is racist. It would include political speech that covers matters of sex, you name it. It excludes one-on-one insults in the work setting, discrimination in the form of workplace harassment which is essentially condoned by the employer who is aware of it or allows it to be perpetuated.

How do I make this message palatable? How do I make it convincing? Trying to sell offensive communication, trying to sell freedom for racists, is not my idea of trying to sell a popular idea. Perhaps I can get you thinking. It's easier to say, it's bad, it's nasty, and we should do away

56. Trask, *Racist White Woman*, 36 BAMBOO RIDGE 87 (1987).

with it, because if we took a straw poll of any group, a majority of people would say, yes, let's do away with it. That's why it's dealt with in the Bill of Rights, which is a counter-majoritarian portion of the United States Constitution designed to limit the freedom of the majority to decide whether or not communication should be restricted.

Let me sketch the following scenario. Let's assume Congress has the power to pass Canada's Section 177, prohibiting the spreading of false news. I select Section 177 because it is the basis for the Canadian prosecution of Ernst Zundel for publishing a book which claims that there was no Holocaust.⁵⁷ George Bush is president. Justices Brennan and Marshall resign because of ill health. Frank Easterbrook and Richard Posner of the Seventh Circuit are named to the United States Supreme Court. *Roe v. Wade* is completely overturned. Congress and the states pass laws prohibiting abortion, defining individual abortion as murder and multiple abortion as genocide. Pro-choicers advocate that abortion is not murder, that women should do whatever they have to in order to obtain abortions, that the fetus is not a person, and that the right-to-life movement is comprised of terrorists and thugs. The people who engage in this advocacy are prosecuted on the theory that they are spreading false news in violation of my hypothetical Section 177, which makes it illegal to circulate untruthful statements about vulnerable minorities. In this case, Congress has defined minorities to be innocent fetuses and those people whose religion teaches that a fetus is a person. If you take the approach of the Canadian Constitution, the pro-abortion advocates should be convicted. Oh yes, you can say, but we're going to construe Section 177 very narrowly to avoid such an outcome. But the only reason that you're going to construe it more narrowly is that you want to, not because you have a principle that explains why it should be construed more narrowly. If, indeed, abortion is murder, if mass abortion is genocide, then it only follows that advocacy of such murder and of genocide can be prohibited under provisions like Section 177.

Now you could say that my scenario can't happen. But it seems to me that some of you are already wondering whether it will happen. To explain why it can happen, you have to make some other assumptions which are inherent in the arguments about the Canadian constitutional provisions that appear to justify censorship of racist communication. One of the assumptions is, the political branches of government can be trusted to make sound decisions about regulating advocacy of unlawful conduct

57. See *R. v. Zundel*, *supra* note 7.

and communications concerning racism. But the government regulation of abortion-related speech is thought to help prevent abortion; if you want to prohibit abortion enough, you can easily justify censorship of the advocacy of abortion. You also have to assume that the government is making decisions based on the general welfare, rather than a desire to please an influential political constituency. Finally, you can go even further by making the assumption that the people who advocate abortion are advocating murder and are therefore a social menace.

The real difficulty with criminalizing the political rantings of racists is the same as criminalizing advocacy of abortion. It is not clear that the purpose is related to protecting against palpable harm. It is just as likely that we criminalize the political rantings of racists to appease the rage that we all feel toward the speakers. Stomping on them makes us feel better. They're bad people, and we want to do something about it. The censorship laws that we are talking about today are not limited to cases where there is provable and palpable harm in the individual circumstance. We have heard that there is a generalized, automatic harm whenever those awful things are said. I'm prepared to accept that assumption in a face-to-face verbal confrontation. I'm prepared to accept that assumption in the workplace. I'm not prepared to accept that assumption for the a soap box speaker. I'm not prepared to accept that assumption from the passing of leaflets. Yes, there is a pain in those circumstances. Yes, we feel ugly. Some of the leaflets that I've seen in the course of representing some clients make you sick to your stomach, but it is, in my view, a harm or an effect which we should not criminalize.

Think of this hypothetical which happens unfortunately in all too many American households. Assume it in your own household. The spouse whom you thought was a loving, true, and loyal spouse tells you that he or she is going to leave you for your best friend, that he or she has always regarded you as worthless and your best friend as something terrific. Not exactly a communication designed to warm your heart. In fact, it is very damaging. Any psychiatrist will tell you the impact of that communication is devastating. We do not criminalize it. Yes, some jurisdictions have laws of criminal conversation. Yes, some jurisdictions have laws in which you can sue the meddler in the relationship. But in this day and age, many states have abolished those laws. Few enforce them. It is an injury that we accept as part of our everyday life.

The criminalization—and this is a point which Mr. Borovoy made very effectively—the criminalization of the kind of racist communication that we all find offensive has never been an effective weapon against ra-

cism. If we make it illegal, the racists will do one of two things: they will either continue to communicate that way and hope they are prosecuted, because they say a few months in jail is well worth the publicity; or alternatively, they will be driven underground where we can't see them to get at them.

My view is that political speech is the centerpiece of the democracy. I do share that First Amendment Romanticism, but I don't believe that everything I've said is romantic. The suppression of racist and offensive political communication in the political marketplace is not going to accomplish what many of you believe it will, and it is romantic to think otherwise. Thank you very much.

Robert Berger: Thank you. And now, our final speaker will be Barry Brown.

Barry Brown: Thank you for inviting me here. As the only non-lawyer on the panel, I feel in a bit of a minority group myself, so it's going to be interesting to address this issue from that point of view. I was not invited here, of course, to debate the fine points of law. I have distinguished colleagues on the panel who have done that well. I was invited here because I am a reporter, and as a reporter, I am supposed to be against censorship. Therefore, I should be against the hate laws. Well, I am against censorship, very strongly. But I am in favor of these laws as a legislative tool to support the foundations and principles of Canadian democracy.

Before I begin my main argument, though, I would like to offer a few observations about differing perspectives in the U.S. and Canada on how different points of view are perceived politically. For example, I understand that Education Secretary Bennett has called the people at this distinguished university a bunch of radical communists for trying to enforce the laws to restrict hate mongering. I feel sorry for you! In my own experience as a freelance journalist, I was talking to an editor in Tennessee about selling him a story, and I was told that my question about whether this story would be acceptable should be directed to the person who was the owner, publisher, and executive editor of this paper. After telling me this man's name, he also cautioned me that I should be careful about it because this man was really "left wing." As a Canadian, of course, I immediately thought the man must be a card-carrying member of Canada's socialists, the New Democratic Party. So I asked, how left wing is he? And the man on the other end of the phone said, well, he believes in things like human rights.

In my talk, while I will obviously refer to law, I will focus mostly on

my own understanding, as a citizen and as a reporter, of what living in Canadian society is about and how these laws work as part of the Canadian experience. First, I'll respond to some of the points that have been made here. Barring hate-mongering speech really should be no different than regulating other types of speech and activity, which do not require a clear and present danger to maintain society's long-term goals and objectives. For example, along with yelling "FIRE" in a crowded theatre, in Canada it is also illegal to identify by name rape victims and juvenile offenders, or to point out that certain evidence came from a wire tap. Controls are placed on how often and when and where we can hunt and fish, how fast we can drive, and what level of insurance we must carry when we drive a car. Controls are placed on the chemicals we use in the environment and upon ourselves. All of this is a mandate of government, with the force of the law behind it. We make it stick, and try to apply it fairly. Now some may say that this comparison is highly questionable. Let's make it clear. The Canadian law does not restrict thought. You can sit with any number of your friends and tell as many race jokes as you feel like telling. It only comes into effect when you try to incite hatred. That is the difference.

I'd like to offer some of my thoughts on the law itself, and then carry on to the larger observation about the Canadian and American democratic traditions. The first point to consider is that these laws do not restrict a principle as much as they *support* one. These laws support Sections 15 and 27 of Canada's Charter of Rights of Freedom. Section 15 reads, "Every individual is equal before and unto the law and has the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on race and national or ethnic origin, color, religion, sex, age or natural or physical disability."⁵⁸ Any law made to help the disadvantaged in any of these groups will not be considered a violation of this section. Section 27 of the Charter directs the judicial interpretation of the Charter to enhance the multicultural heritage of Canadians.⁵⁹ Canada's hate propaganda law and the spreading of falsehood law⁶⁰ protect people against the inhuman violence that is hate, because hate is rooted in one western vice, insensitivity to the sufferings of others.

People here have discussed the attitude of hate in a legal context. I'm not a lawyer. I'm not going to do that. I'm going to tell you my view

58. See *Charter*, s. 15(1), 15(2).

59. See *Charter*, s. 27.

60. See *supra* notes 2, 24-29 and accompanying text.

on hate, just as a person in society. Hate and bigotry against identifiable groups—not to incite and disturb people, but hate as bigotry—is not like other political views. It isn't Libertarian or Communist, it isn't sedition or revolution or anarchy. Hate is the oldest, most destructive human reaction. And it's predicated on destruction—permanent destruction—because hate cannot exist without the component to destroy. It's one group against another, destroying the value of each society together.

Among the values that support these laws is the maintenance of trust. I submit to you that extremism reaps extremism and moderation follows security. Commenting as an observer and not as a statistician, it seems that the rise of militant ethnic groups is the direct result of insecurity within and distrust of the state's commitment and ability to protect them. For example, when the United States Supreme Court allowed the American Nazi Party, with apologies to my fellow panelists here, to march in a suburb of Chicago known as Skokie where many Holocaust survivors live,⁶¹ it undoubtedly brought new members to the Jewish Defense League. These new members were probably convinced with arguments that ran like this: if society is not going to protect us from racial attack now, why would they protect us if these madmen ever came to power? And if you doubt that interpretation, consider the League's slogan: "We are talking about Jewish survival." Extremism breeds extremism. I'm not trying to single out the Jewish Defense League here. The same holds true for all groups who feel threatened. So the question becomes, how do we preserve social trust while encouraging both civility and radical dissent?

Before coming down here, I was given some readings on the subject of hate propaganda law. One article by American law professor Leon Friedman was titled *Freedom of Speech: Should It Be Available to Pornographers, Nazis and the Klan?*⁶² Leaving aside pornographers for the moment, Friedman presents a classic first amendment argument based on the absolutist interpretation of freedom of speech that we've heard here today. His argument, in sum, is that while we understand the pain and suffering of minority groups, we allow hate mongering for the good of all minority groups and for society as a whole. The essential reasoning of his argument, I believe, can be found in a quote he offers from Justice Robert Jackson in *Thomas v. Collins*, "[E]very person must

61. See *supra* note 44.

62. Friedman, *Freedom of Speech: Should It Be Available to Pornographers, Nazis, and the Klan?*, in *GROUP DEFAMATION AND FREEDOM OF SPEECH* (M. Freedman ed., expected publication 1990).

be his own watchman for truth, because the forefathers did not trust any government to separate the true and false for us."⁶³ With all due respect to Justice Jackson and Professor Friedman, the government already separates truth from falsehood in advertising laws and in the very existence of courts and, I submit, universities. The role of government I will address later.

As a Canadian, I found some curious turns of logic in Friedman's argument. He says, for instance, that the Scandinavian countries and England can't afford group defamation laws because they are not as diverse or as divided as Americans. Their social compact is a different one. He writes, "Their laws teach the need for civility in a society with far less tension and group oppression than ours. The need for a hands-on attitude among pluralistic groups does not exist in the same way."⁶⁴ First of all, he neglected to include Canada in his list of countries which can't afford those laws. Presumably, this is because his argument that America is unique as a pluralistic society would go out the window. He also notes that these societies are more tolerant and civil without giving much thought to whether the existence of the hate laws or anti-hate laws encourages that tolerance and civility. He also fails to show why a hands-off attitude is necessary in a multicultural society, unless his argument is that tolerance and sympathy are not worthwhile goals except when achieved by an accident of history. Friedman goes on to say that it is comforting to walk down a street in America knowing that you cannot be arrested for anything that you say. But leaving aside for the moment the patent falsity of the latter part of that statement, I turn your attention to the comfort factor. Mr. Friedman may feel theoretically comfortable walking down an American city street at night, but in practice, walking down a street in Toronto at night is much more comforting. Especially when encountering different ethnic and racial groups.

When these hate laws were first proposed, the Canadian Civil Liberties Association said they would lead to horrible abuse. They predicted Adolph Hitler's *Mein Kampf* and books by angry activists like Eldridge Cleaver's *Soul on Ice* and Alan Paton's *Cry the Beloved Country* would be considered hate literature and forced from the shelves. However, those books and others with similar themes are still available in Canada. In fact, the law has been applied less than a dozen times in the eighteen years since it has been enacted, which is hardly rampant censorship. But that should not be surprising, since these laws were not designed as a tool

63. *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945)).

64. *Id.*

for censorship. They were crafted to uphold society's commitment to tolerance, to be used only with the consent of the attorney general.

But what is the alternative to not having the law? The alternative is not, to people like James Keegstra and Ernst Zundel, to simply live quiet hate-filled lives with other quiet hate-filled people. The alternative is that racist groups will get television shows on cable stations like the Ku Klux Klan ads in the United States, shows which will allow them to preach their message of hate under the guise of a freedom they don't believe in. Racists thrive on lies because racism is a lie. They don't care about the truth.

Somebody brought up Geraldo Rivera earlier knowing I was going to mention this. We've all heard about the program with the white supremacist that turned into a brawl. Well, on an earlier show, he had on, as his guests, people who were themselves talk show hosts, from T.V. and radio stations across the United States. When the discussion turned to hate mongers, they all agreed on some essential points. The first was, the views of hate mongers should be aired so that they could be refuted. And the second was, membership in the hate mongers groups increased after each of these shows. In our society, it's said, results are all that matters. Milton said, "Let [truth] and falsehood grapple, who ever knew [t]ruth put to the worse, in a free and open encounter."⁶⁵ But I would take issue with that statement and with the sentiment behind it, because anyone who believes that the truth cannot be put to the worse in a free and open encounter has never worked in politics, the media, advertising, and certainly never in the law. Hate mongers are not sitting out there waiting to be the punching bag for liberal tolerant values. They are out there to sell their message. And in the emotional selling game of politics, only three things count: television, television, television.

This brings me to another point. The old saying, "If you want to send a message, try Western Union" is fraud. Every story has a message. The only difference is whether the message was supported by the status quo. To tie the two points together, consider this. When society's media are given over to hate mongers, sales are inevitably made. So how each country approaches this decision speaks to the essence of each nation, our values and structures.

Going back to Friedman for a moment, he interprets the American social contract as, we won't gang up on you with our laws, our courts,

65. J. MILTON, *AREOPAGITICA* (1644), *reprinted in* II COMPLETE PROSE WORKS OF JOHN MILTON 485, 561 (E. Sirluck ed. 1959) (modern spellings used).

and you won't gang up on us for anything we say. Friedman accepts that there are automatic advantages to being, say, a white-skinned, Christian in our society. He accepts this as normal, as he does the prejudices that he feels will inevitably follow. But in accepting this as normal, he dismisses the reality, which is that any attack is far more effective in conditioning our responses to and expectations of minority groups than anything the minority groups can offer in rebuttal. In the 1960s a psychology experiment showed that Black children were more likely to ascribe positive qualities to White dolls than with Black ones, because of the image of the Black people they saw on television and in the movies. Repeating these messages over and over again can lead to a downward cycle, where lowering expectations becomes a self-fulfilling prophecy. Yet, Friedman virtually encourages ethnic counter-militancy by admitting it is the only way that he can think of to overcome that inherent disadvantage. When the courts are turned to for justice, he offers only uncontrolled rhetoric and equally intolerant ethnic groups to replace them.

The Canadian approach, however, is different. Sir Winston Churchill once said that England and the United States were two countries that are separated by a common language. Well, to paraphrase Churchill, the first thing to understand about Canada and the United States is that we are two countries that are separated by a common democratic tradition. In the melting pot culture of the United States, some people consider it easy to attack others for not being American enough. In multicultural Canada, there is no such concept as, I'm a Canadian. Some people say, how can you be a country if everyone has a multinational self-image, if everyone is a French-Canadian or English-Canadian or Indian-Canadian or whatever? But that multiculturalism is exactly what Canada is about.

Comparing Canada and the United States is like comparing a mosaic to a painting. Like the United States, we are a country born of democratic principles, not demographics. But the North American experiments have taken two different paths. Canadians, it's well known, are a cautious lot. Canadian society itself is described as evolutionary, not revolutionary. America's revolutionary society, it often appears, focuses on the notion that only the survivor is right. Hence, the argument that the best way is to let every man fight it out, and may the best idea win. However, the evolutionary principle is one of consensual change, of sensitivity and compromise, and the hate laws are a pillar of that principle. The absolute right to be a racist in public appears to be American. Before I go on, I would like to make it clear that I don't think of Canada

as perfect. We have prejudice and justice and nationalism, even as America has socially concerned citizens determined to insure tolerance.

Let me turn to the question of maintaining democracy. I won't compare Canada and the United States directly. Both countries are healthy democracies. Therefore, the issue should not be treated as one of freedom of speech. It should be seen as a question of human rights—everyone's rights, and how you can best protect them. These laws are not there just to protect minorities. These laws are the will of the majority, of society as a whole. We are repulsed by these ideas and we will not sanction them. Laws can be proactive without diminishing freedom. That is why the hate laws are specifically used before a physical attack on a person or property occurs. The laws were made with extreme care and used with even greater care. Thank you very much.

Robert Berger: I thank our speakers for a most stimulating discussion. All of us, I am sure, have been forced to reconsider this issue as a result of these forceful presentations of divergent views. The talks today have demonstrated that there is room for serious debate on this question, and that this debate can be enhanced by considering the question in the context of two similar—but as shown today, perhaps quite different—democracies.

